## Table of Authorities Cited


| Cases | Pages |
|---|---|
| Commissioner v. First Security Bank of Utah, 405 U.S. 394 (1972), 31 L.Ed.2d 318 | 3, 8 |
| Lucas v. Earl, 281 U.S. 111 | 3, 8 |
| Teschner v. Commissioner, 38 T.C. 1003 (1962) | 3 |

**Codes**

| | |
|---|---|
| Internal Revenue Code of 1954, Section 701 | 8 |

# In the Supreme Court
OF THE
# United States

OCTOBER TERM 1972

No. 71-1022

UNITED STATES OF AMERICA,
*Petitioner*
vs.
JAMES A. BASYE and EVELYN E. BASYE, et al.,
*Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## RESPONDENTS' PETITION FOR REHEARING

### THIS COURT'S DECISION IS CONTRARY TO THE STIPULATED FACTS.

Petitioners request a rehearing on the ground that the Court has failed to accept as true certain stipulated facts, facts which if believed require a decision in respondents' favor.

The case was presented to the District Court on an Agreed Statement of Facts. For that reason there was no trial of any fact issue. The only disputes ever presented for judicial resolution were questions of law. Both lower courts resolved the case in respondents' favor on the stipulated facts.

This Court has now reversed, not because of any disagreement with the legal principles applied below, but because of a failure to accept as true paragraph 16 of the Agreed Statement. That paragraph reads as follows:

> The primary purpose of the retirement plan was to create an incentive for physicians to remain with Medical Group, or other groups of physicians contracting to serve Health Plan members, and thus to insure Health Plan that it would have a stable and reliable group of physicians providing medical services to its members with a minimum of turn-over. The retirement plan was patterned after one previously established in Southern California between Health Plan and a partnership of physicians serving Health Plan members in its Southern California Region. *The payments which Health Plan agreed to, and did make to the trust, were paid solely to fund the retirement plan, and were not otherwise available to Medical Group or to the individual members or employees thereof.* (Italics supplied.)[1]

Both lower courts understood the Agreed Statement to mean that the retirement plan was not established by the

[1]Paragraph 16 must, of course, be read in its full context as part of the entire Agreed Statement of Facts, including paragraph 13 which states that the plan ". . . was not unilaterally established by Medical Group," and paragraph 15, which states that ". . . Health Plan and Medical Group were separate organizations independently contracting with one another at arms' length." (Appendix on Writ of Certiorari, pp. 80-88.)

Medical Group partnership with funds over which it had any control; that had the Medical Group partnership elected not to agree to the retirement plan, it would not have received any additional current income; and that it did not agree to accept less direct compensation in exchange for these retirement plan payments.

The stipulation established, we had thought plainly and unequivocally, that the Kaiser Health Plan made these funds available on its own terms or not at all; that is, although the partnership might have refused to participate in the plan, such a refusal would not have increased its current income in any degree whatsoever. The stipulation *negated*, by agreement of the parties, what is surely an essential predicate of a *Lucas v. Earl* assignment, namely, that the "assignor" have exercised *some* degree of legal or economic power to accomplish a deflection of income from his account to that of another. This control concept was recently reaffirmed by this Court in *Commissioner v. First Security Bank of Utah*, 405 U.S. 394 (1972), 31 L.Ed.2d 318, 326, as follows:

> In cases dealing with the concept of income, it has been assumed that the person to whom the income was attributed could have received it. The underlying assumption always has been that in order to be taxed for income, a taxpayer must have complete dominion over it.[2]

---

[2]The Court also approved *Teschner v. Commissioner*, 38 T.C. 1003, 1009 (1962) which expressly held that the exercise of a power to designate the recipient of income is not alone sufficient to give rise to the application of the *Lucas v. Earl* doctrine (31 L.Ed.2d 318, 328, fn. 22). A *fortiori* Medical Group's mere consent to the establishment of this Retirement Plan to be funded by Health Plan with funds completely beyond Medical Group's control, was not sufficient.

The opinion of this Court does not purport to alter or modify that principle. Rather, it is based on a different view of the facts, as if the Court were unwilling to believe that the facts as stipulated were actually true. Thus, the opinion says:

> The Court of Appeals found the *Lucas* principle inapplicable because Permanente "never had the right itself to receive the payments made into the trust as current income." 450 F.2d at 114. In support of this *assertion*, the court relied on language in the agreed statement of facts stipulating that "the payments . . . were paid solely to fund the retirement plan, and were not otherwise available to [Permanente]. . . ." *Ibid.* Emphasizing that the fund was created to serve Kaiser's interest in a stable source of qualified, experienced physicians, the court *found* that Permanente could not have received that income except in the form in which it was received.
>
> The court's reasoning seems to be that, before the partnership could be found to have received income, there must be proof that "Permanente agreed to accept less direct compensation from Kaiser in exchange for the retirement plan payments." *Id.*, at 114-115. *Apart from the inherent difficulty of adducing such evidence, we know of no authority imposing this burden upon the Government.* (Italics supplied.)
>
> (Opinion, p. 10)

At this point in its opinion, the Court fundamentally misconceives the facts stipulated, and the entire decision hinges on that misconception. The Court of Appeals did not impose upon the government the burden of proving that Permanente agreed to accept less direct compensation in exchange for the retirement plan. Quite the con-

trary. The burden of proof on that issue—*i.e.*, that Permanente did *not* agree to accept less—was on respondents.[3]

That burden was met when the parties stipulated that the payments which Health Plan agreed to make into the plan *were not otherwise available*, because if Permanente had agreed to accept less direct compensation in exchange for the plan, such would have meant that the payments had been "otherwise" available, *i.e.*, in the form of direct compensation. Evidence establishing that agreed fact would have been presented if the issue had been tried.[4]

The case should be viewed as if that issue of fact had been tried, as if that evidence had been presented at the trial, and as if the District Court had then adopted the "Agreed Statement of Facts" as its findings in respondents' favor. Yet the decision of this Court is the same as if the issue had been tried and respondents had lost.[5] The ultimate effect is to deny respondents their day in court.

---

[3]Any "difficulty in adducing evidence" on this issue was a part of respondents' burden, not the government's. The issue, of course, was "whether or not" Permanente agreed to accept less direct compensation in exchange for the retirement plan. If the government had the burden of proof—which it did not—it would have been to prove that Permanente *had* agreed to accept less. If the respondents had the burden of proof—which they did—it was to prove that Permanente *had not* agreed to accept less. In stating that ". . . there was no evidence that Permanente agreed to accept less . . . ," the Court of Appeals was merely expressing its understanding that the issue was resolved by the Agreed Statement.

[4]See Certificate of Counsel, Appendix, p. iii.

[5]The Court characterizes as "found" by, or as an "assertion" of, the Court of Appeals, the facts which that court *by reason of the stipulation* accepted as true. In a similar vein, the Court refers to *Kaiser's* "apparent" insistence upon payment to the trust, as if it were not bona fide and *real*. (Opinion, p. 11.)

Paragraph 16 was included in the Agreed Statement for the specific purpose of establishing that this was *not* a case in which the Medical Group partnership had exercised the power to deflect to the retirement plan (thus deferring until a later year) compensation which it might otherwise have received currently. Respondents' counsel were well aware that if such were the fact, the payments would be held to constitute partnership income. Because that issue could not be resolved by reference to the terms of the written instruments alone, respondents had requested a jury trial in the District Court. The terms of the Agreed Statement were arrived at only after weeks of discussion. Paragraph 16 was proposed by respondents' counsel as an alternative to a trial of that issue. It was agreed to by the government's attorneys only after extensive discovery, with full knowledge of its implications, and in the belief that if was better to stipulate the fact than to try the issue and lose.

We have said that this Court appears unwilling to believe that the facts as stipulated were true. Perhaps it is, rather, that the stipulation has been misinterpreted on this point. At the oral argument, Mr. Justice Rehnquist suggested that the "not otherwise available" language meant merely that *after* the money was placed in trust it was beyond the control of the Medical Group partnership (Transcript of Oral Argument, at p. 24). If that were all it meant, then of course, the Court's decision would be correct. But it was intended to mean that *before* the payments were made, at the very time they were agreed to be made, Medical Group had no control over those funds.

Thus the sentence reads, "The payments which Health Plan *agreed to*, and did make . . . were not otherwise available."[6]

Respondents' counsel has at every stage of this case, in the District Court, in the Court of Appeals, and in this Court, consistently maintained that interpretation of the stipulation. It has *never* been challenged by *any* government lawyer, *including* the lawyer who negotiated, on behalf of the government, the terms of the stipulation.[7]

It is particularly distressing, in the light of this history and after two eminent lower courts have believed and adhered to the stipulation according to the original intention of the parties, to find that the Supreme Court of the United States has decided the case by disbelieving or misunderstanding the facts which the stipulation resolved. Respondents have no quarrel with the legal principles upon which the Court has based its decision. If the facts were as the Court mistakenly took them to be—if the Medical Group (like the hypothetical Ropes & Cromwell firm) had agreed to place in this trust compensation which it could have enjoyed as current income, then the Court

---

[6] As can be seen from the Certificate of Counsel, Appendix, p. ii, this portion of the stipulation was not necessary to establish that *after* the payments went into trust they were beyond control of the partnership. The trust documents cover that, and the government attorneys had from the beginning been willing to stipulate that all the terms of the retirement plan were integrated in the writings.

[7] If the government's counsel now wish to question that interpretation—and we do not think that they do—we hereby offer to rescind the stipulation so that the case may be remanded for a trial of that issue.

is correct: such would have been current income to the partnership under the principle of *Lucas v. Earl*.[3]

We also have no quarrel with the Court's concern about schemes for tax avoidance. But that concern cannot justify sweeping away a legitimate arrangement based on a unique set of relationships not likely ever to be duplicated elsewhere. If the opinion stands, a large number of people will have to pay taxes on "income" over which neither the partnership nor they ever had any control, and which, due to the forfeiture provisions of this retirement plan, they will never receive.

---

[3]At the oral argument, the Solicitor General posed three hypothetical cases, involving the law firm of Ropes & Cromwell and its client, International Conglomerates. Each example was based on the fact that:

> In the past, Ropes & Cromwell has billed at appropriate intervals and these have been paid. Now let us suppose that . . . *hereafter ten percent of the bill* be paid to the law firm's retirement fund. (Transcript of Oral Argument, at 16-17.) (Italics Supplied)

The Solicitor General did not put a case in which the law firm continued to be paid 100% of its bills, the payments into the fund being in addition thereto, in which it would not have received anything more for its services had no such payments been made. When that distinction was exposed by the Court's questioning, respondents' counsel seemed unwilling to concede that "in the Solicitor General's hypothetical case . . . the result would be other than the result you contend for in this case." (Transcript of Oral Argument, at 29-30.) Mr. Brookes' response, however, rested upon his view that Section 701 was controlling without regard to the distinction. In fact, respondents do concede that on the hypothetical facts put by the Solicitor General, the portion of Ropes & Cromwell's bill which was deflected to the retirement plan would be partnership income. But in the case at bar, there was no such deflection.

The distinction is critical and controls the result here unless this Court intends to broaden the *Lucas v. Earl* doctrine to include payments which it has been found (or which it has been stipulated) were "not otherwise available" to the taxpayer. Such would be a significant departure from the standard enunciated in the *First Security Bank of Utah* case, that *Lucas v. Earl* applies only where "the income would have been received by the taxpayer had he not arranged for it to be paid to another. . . ."

A rehearing should be granted. The decision should be vacated and a new decision entered based on the facts as stipulated, or at the very least, the matter should be remanded to the trial court for a hearing on the factual issue.

Respectfully submitted,

JOHN F. WELLS,

*Attorney for Respondents and Petitioners.*

STARK, STEWART, SIMON & SPARROWE,

*Of Counsel.*

March 21, 1973.

(Appendix Follows)